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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 503

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ESTATE OF MARSHAL L. NOEL, Deceased, WILLIAM H. FRANTZ and RUTH M. NOEL, Executors,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Statement

The petition of the Commissioner of Internal Revenue sets forth the citation of the opinions below, the jurisdictional basis, the question presented, and the statute involved. There is no reason to repeat them here.

The factual statement of petitioner insofar as it relates to the opinion below sets forth, in essence, the facts concerning the death of decedent, the purchase of the flight policies, the collection of the proceeds by his wife, and the conclusion of the Commissioner and the Tax Court the proceeds were part of the decedent's gross taxable estate. However, the Circuit Court did not consider, which it was not required to do by virtue of its opinion, the facts to establish the executors' contention that decedent never had any incidents of ownership in the policies (R 7-11) or, if he did, he had effectively assigned or divested himself of such ownership prior to embarkation (R 12-18).

Reasons for Denying the Writ

The Commissioner seeks a review of the decision of the Court of Appeals for the Third Circuit, which he says "has upset a firmly established interpretation of" §2042 (2) of the Internal Revenue Code of 1954 (Petition, p. 3). That section subjects to the federal estate tax proceeds of insurance receivable by named beneficiaries "under policies on the life of the decedent." The Commissioner argues that "an interpretation which has governed the rights of thousands of taxpayers" for 35 years has been overturned (Petition, p. 3-4); that a contrary result in another circuit is "almost inevitable" (Petition, p. 4); and that the decision of the Third Circuit "is bound to engender much uncertainty and * * * litigation" (Petition, p. 4).

The question, however, is whether there are special and important reasons, for review, and, in the absence of a conflict among the circuits whether the decision below was, within the scope of Rule 19, on an important question of federal law which has not been, but which should be, settled by this Court.

It should be noted at the outset that the Court of Appeals is the first court to consider in depth the novel question of includability for taxation of the proceeds of airplane accident coverage. The opinion below reflects most careful research and exhaustive analysis of the statute, the Congressional intent and the relevant authority on insurance coverage. Such disposition of the issue, the absence of conflict in the circuits on the question and the patent absence of any farreaching question of public importance preclude the granting of the writ.

The special and important reasons assigned by the Commissioner as justification for the writ may be divided into two categories, first, that uncertainty and litigation will be engendered by the decision which almost inevitably will be rejected by other circuits and, secondly, that an interpretation of the statute by the Board of Tax Appeals[1] is acceptable to the Commissioner while the decision of the Court of Appeals for the Third Circuit is not.

With respect to the "stream of litigation" forecast by the Commissioner and his prediction that the Court of Appeals' decision will be rejected by other circuits, it is significant that the Commissioner adverts to no pending litigation in either the Tax Court, the Court of Claims or any Federal district court or court of appeals involving the question.

Respecting the acceptability to the Commissioner of the Board of Tax Appeals' holding as against the holding of the Court of Appeals, the Commissioner seeks to continue a wholly unjustified interpretation of a section of the taxing code to the end that he may include proceeds from accident coverage which is not life insurance in either the

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[1] *Ackerman* v. *Commissioner*, 15 B.T.A. 635.

technical or popularly accepted sense[2] and which can be accomplished only by stretching and distorting the language of the section beyond the meaning of the words, beyond the intent of Congress and beyond the manifest purpose of the statute as a whole. The sole basis for the Commissioner's position appears to be his unshakable adherence to the *Ackerman* decision which in turn was based on a decision[3] which was repudiated by the very court which decided it even prior to reliance upon it by the Board of Tax Appeals.[4]

The Commissioner urges that the decision of the Court of Appeals would withdraw from the estate tax such conceded forms of life insurance as term insurance and part of the proceeds of double indemnity life insurance policies paid by reason of accidental death (Petition, p. 6). This is a perversion of the holding in the instant case. In the first place, the Court of Appeals carefully limited its decision to the flight policies in question by stating: "We are of the opinion, and so hold, that the term 'insurance under policies on the life of a decedent' does not comprehend insurance under accident policies of the kind here in question." The fact is under a double indemnity policy the "risk" involved is nevertheless death and not "accident".

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[2] That these policies were not life insurance is clear from the record. First, the companies that issued the policies were not even authorized to write life insurance; the coverage was accident coverage and neither the insurers or the insurance industry regarded these policies as life insurance policies (R17a, R18a).

[3] *Logan* v. *Fidelity & Casualty Co.*, 146 Mo. 114, 125 (1898).

[4] *Brunswick* v. *Standard Acc. Ins. Co.*, 278 Mo. 154, 166, 213 S. W. 45 (1919); *Andrus* v. *Business Men's Acc. Assn.*, 283 Mo. 442, 453, 223 S. W. 70 (1920); *Aufrichtig* v. *Columbian Nat'l. Ins. Co.*, 298 Mo. 1, 12, 249 S. W. 912 (1923); *Jones* v. *Prudential Insurance Co. of America*, 208 Mo. App. 679, 236 S. W. 429 (1922).

The fact of accident merely determines the amount of payment. Secondly, the Commissioner's suggestion that the proceeds from term life insurance policies may be excluded is absurd. Term life insurance which matures upon death, regardless of cause, is just as effective a form of insurance on the life of decedent as ordinary, limited payment, or endowment life insurance. It has just nothing to do with accident insurance in this context.

Recognizing, as he must, that the decision by the Court of Appeals is in conflict with no other court of appeals' decision, Commissioner, to secure review presumptuously predicts an "almost inevitable" future conflict in the circuits and a stream of litigation (Petition, p. 4, 6, 7). The decision conflicts only with his position. Commissioner requests this Court to settle the issue but the issue is now settled. Commissioner cannot presume that other courts of appeal will reject the eminently correct decision reached by the court below.

The Commissioner suggests that this decision has injected "confusion and uncertainty" into existing laws (Petition, p. 4, 7). To the contrary, the decision is final and sets at rest a novel question. Commissioner's determination to "nonacquiesce" and to relitigate the same issue in other circuits is the only source of possible "confusion and uncertainty." The Commissioner's choice to relitigate may create the stream of litigation which he predicts but this action on his part in and of itself does not supply the special and important reasons for granting the writ.

Commissioner suggests that the question involved is "one of broad administrative significance". The figures cited by Commissioner do not bear this out. Even if insurance proceeds from accidental death coverage are considered to be "* * * insurance under policies on the life

of the decedent * * *" taxation, (assuming the gross estate of the insured is in excess of $60,000.) can arise only if the insurance policies were such that incidents of ownership might be possessed by the particular decedent. Therefore, the mere fact that $7,000,000. was paid under all airplane accident policies in 1963 because of accidents resulting in death, does not establish that the question of includibility is one of broad administrative significance. The Commissioner has not suggested the amount of taxes involved, how many such decedents had taxable estates and how many possessed incidents of ownership in these policies. There is a practical reason why neither a broadly administrative nor an important tax aspect is here involved. The only so-called incidents of ownership in the policies here involved are simply boiler-plate provisions allowing decedent the practically unexercisable right to change beneficiaries.[5] Since such "incident of ownership" is of virtually no practical benefit to the insured and in each instance the insurance company or the insured could in the future unilaterally remove this sentence from airplane accident policies, and thus remove from consideration any attempt to include the proceeds from these policies in the gross estate of any decedent, the question here involved may become moot. The amount of taxes involved may be of no substantial significance.

Absent a clear and cogent demonstration of a substantial administrative question, and it is submitted that there has been no such showing here, *certiorari* should not be granted. In *U. S.* v. *Rimer,* 220 U. S. 547, the Court held

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[5] In the instant case, the Executors have taken the position (and still do) that the boiler plate right to change beneficiary in a single trip airplane accident policy is not "possessed" by the decedent, since being airborne at all times that the policy is in effect, he could not possibly effectually exercise it.

that the action of the Circuit Court of Appeals was final and since the decision either in its character or importance was not within the scope of the grant of power to review by *certiorari,* the writ of *certiorari* was dismissed.

But whether or not a substantial administrative question is involved, the writ of *certiorari* should be denied where, as here, the decision below is correct.

The Commissioner contends Sec. 2042(2) includes "every form of insurance compensation for the loss of life of the insured" (Petition, p. 5). But this is contrary to the Commissioner's own ruling. In Rev. Rul. 57-54, CB 1957-1, p. 298 the Commissioner has ruled that insurance paid pursuant to a contract between an insurance carrier and the owner of an airplane to the personal representatives of a passenger who died as a result of an airplane accident regardless of the owner's legal liability for damages, is not taxable under Sec. 2042 if the payment is conditioned on the execution of a full release of all claims for damages for the death. Furthermore, the Commissioner in this broad statement completely ignores a prerequisite to the tax is the possession by the deceased at his death of incidents of ownership in the policy. It is a radical and unjustified interpretation of the statutory language.

The court below clearly pointed out the marked and substantial differences between life and accident insurance (Petition, p. 11-13).

The underwriting principles involved are totally different. The premium cost and conditions for the issuance of life insurance are dependent upon factors such as the insured's age, health, hereditary background, moral status, temperance and occupation. No such life insurance underwriting factors are considered in airplane accident in-

surance (R. 12a, 13a); obviously because it is not insurance which matures upon mere cessation of life regardless of cause.

Of the some seven or eight million such policies issued per year, all bear the same premium ratio regardless of the insured passenger's age, health, hereditary background, moral status, temperance, occupation or the length of his trip.

Based upon the certainty of payment upon death irrespective of cause, life insurance has taken its place in the forefront of estate planning enabling an insured to effectuate his testamentary desires. In contrast, the inherently speculative nature of single trip airplane accident renders it useless in estate planning. Whereas in life insurance an applicant must meticulously state his desires respecting disposition of cash and surrender values, in this airplane insurance the applicant was neither asked nor permitted to designate disposition of rights—if any there were (R. 16a).

In attacking the decision of the Third Circuit the Commissioner asserts that its distinction between a life policy and an accident policy is "irrelevant" and "untenable" (Petition, p. 5). However, he glosses over the completely different nature of the risks assumed by the issuers of life and accident policies heretofore adverted to and pointed out by the Court below. The Board of Tax Appeals in *Ackerman* v. *Commissioner* (15 BTA 635), failed to note the different nature of the risks assumed by the insurer in an accident policy and in a life policy when it stated "In each case the risk assumed by the insurer is the loss of insured's life * * *" The Tax Court quoted this statement with approval (R. 48a). This Court cited *Ackerman* and other cases in *Helvering* v. *LeGierse*, 312 U. S. 531, not in approval of the foregoing statement as

erroneously implied by the Commissioner, but merely for the proposition that a single premium life policy purchased in conjunction with an annuity contract was not truly an insurance policy because it did not contain the elements of risk-shifting and risk-distributing essential to life insurance contracts.

Further, the Commissioner, in asserting that proceeds of policies of this nature payable by reason of accidental death are subject to the tax because of the Congressional policy which seeks, as a general matter, to bring into the gross estate all items of value owned by the decedent, or over which he exercised control during his life is contrary to the expressions of Congressional intent set forth in the opinion below (Petition, p. 14-15).

Moreover, the statutory language does not clearly and specifically include proceeds of airplane accident coverage. If Congress wishes to include such proceeds, it may accomplish this by simple amendment of the statute. But this Court can not be asked, as the Commissioner does, to rewrite the statutory clauses to include "*every* form of insurance compensation for the loss of life of the insured" (Italics ours) (see Petition, p. 5) when the words used in the statute are "* * * the amount receivable * * * under policies on the life of the decedent * * *". The difference in meaning between what the Commissioner suggests was the intention of the statutory wording and the words actually used is glaring.

The purpose of subjecting to the estate tax the proceeds of life insurance policies payable to specific beneficiaries was to obviate a method, directed at persons of wealth, of creating a substantial estate through the purchase of life insurance which would pass free of the tax. Certainly, the taxation of insurance proceeds arising solely by reason of accidental death was not the aim or intention of Congress.

If the general proposition concerning the policy of Congress asserted by the Commissioner were true, then it would appear that, at best, the portion of a tort claim at law for wrongful death attributable to the pain and suffering of the decedent prior to his demise would be taxable. Indeed, the Court below, in tracing the history of the revenue acts relating to taxation of the proceeds of life insurance policies and the expressions of Congressional intent in respect thereto noted that the purpose was "to foreclose resort to the purchase of life insurance as a means of tax avoidance" (Petition, p. 15). Certainly, the purpose in purchasing flight insurance cannot be said to be a tax avoidance scheme. More truly, in this instance, the purpose could have been to insure against an accidental death during an international flight where the recovery for a wrongful death against the carrier is sharply limited and circumscribed by the provisions of the Warsaw Convention. See *Block* v. *Compagnie Nationale Air France,* N. D. Georgia (1964) 229 F. Supp. 801.

It should be noted, in passing, contrary to the assertion in footnote 4 page 6 of the Petition, the Third Circuit did not find that decedent had retained incidents of ownership in the policies. The court below noted merely (Petition, p. 10) that the policies reserved to the assured the right to assign the policy or to change the beneficiary and that these were exercisable incidents of ownership. The Court of Appeals made no finding that decedent had retained these incidents of ownership nor did it indicate in any way its agreement with the finding of the Tax Court (R. 49a) that he did. In view of the result it reached, the Court of Appeals had no need to consider the claim and argument of the Executors that the decedent never did have, or, if he did have, he had effectively divested himself of all incidents of ownership (R. 7-19).

CONCLUSION

It is respectfully submitted that the petition for a writ of *certiorari* should be denied.

October 6, 1964.

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